

No. 20,737

IN THE

United States Court of Appeals  
For the Ninth Circuit

D. R. KINCAID, LTD. and THOMAS A.  
GIULI, doing business as Kincaid-  
Giuli Joint Venture,

*Appellants,*

VS.

TRANS-PACIFIC TOWING, INC., BROKERS,  
INC., and CLARENCE C. T. LOO,

*Appellees.*

Appeal from the District Court of the United States  
for the District of Hawaii

Honorable C. Nils Tavares, Judge

REPLY BRIEF OF APPELLANTS

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**REPLY BRIEF OF APPELLANTS**

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**STATEMENT OF CASE**

Appellee's Answering Brief raises three basic questions:

(1) On the merits themselves, did the Court below reach the right result, namely, a finding that Appellants failed to sustain their burden of proof?

(2) Under what circumstances should a Court of Appeals set aside the judgment of a District Court, sitting in admiralty without a jury?

(3) Even if this Court should find that the Court below was in error in finding that Appellants failed to prove negligence on the part of the tug, should this Court review the question of whether exculpatory clauses in towing contracts are void and against public policy?

We feel that the first question above should be left for oral argument rather than for further written briefs.

As to the second question, we basically agree with the authorities set out by Appellee as to the circumstances under which a Court of Appeals may reverse the findings of the District Court, but would not be bringing this appeal unless we believed that the judgment of the Court below was "clearly erroneous", and again suggest that this is a matter for oral argument.

Regarding the third question raised, whether this Court should now review the validity of exculpatory clauses in towage contracts, we submit that this Court need not review the question, in a sense, as it is a matter clearly decided by the Supreme Court of the United States, and should this Court reverse the findings of the Court below, the cause should be remanded, not for the purpose of ruling on the question but to assess damages.

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#### SUMMARY OF ARGUMENT

The question of validity of exculpatory clauses in towage contracts which would purport to excuse the tug from liability for its own negligence has been

clearly decided by the United States Supreme Court, and is not subject to review by this Court.

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### ARGUMENT

Appellee in its Answering Brief has appeared to argue that a clause in a towage contract purporting to excuse the tug from its own negligence is valid and enforceable, and therefore, even if the Court below was in error as to the tug's negligence, it, the Appellee, is not liable to Appellants because such negligence is excused by the terms of the contract.

Appellee cites the case of *The 'Oceanica*, 170 F. 893 (1909 C.C.A. 2d) cert. den. 215 U.S. 599, 30 S. Ct. 400, 54 L. Ed. 343. The Court in that case admitted that it was departing from previous decisions in holding that a tug could escape liability for its own negligence to the tow under a contract provision so excusing it, and stated at 170 F. 900 that:

“The question should, and we hope will, be set at rest in this case by the Supreme Court.”

The Supreme Court chose to deny certiorari, but some years later in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 99 L. Ed. 911 (1955) met the question squarely and held that regardless of the terms of the towage contract, the tug cannot escape liability for its own negligence. Appellee quotes in its brief from the dissent in the *Bisso* case, but the majority opinion could not be clearer. It is pointed out that it had previously held in *The Syracuse*, 12 Wall. 167 (1871)

that notwithstanding the terms of a towage contract whereby all risks were to be assumed by the tow, the towboat "must be visited with the consequences" of its negligence. The Court pointed out that the Second Circuit in *The Oceanica*, supra, stood alone in its position and clearly put the issue to rest. In his dissenting opinion in the *Bisso* case, Mr. Justice Frankfurter, in a caustic mood, denounces this Circuit as being the only Circuit to differ with the Second Circuit's decision in *The Oceanica*, supra. He says at 349 U.S. 99-100:

"The Circuits other than the Ninth do not disclose decisions that towboats cannot by contract escape liability for negligent towage. In the Ninth, there is talk, not decision."

Mr. Justice Frankfurter goes on to cite various decisions of this Circuit to show that the contentions of the Appellants herein have always been the position of this Circuit. *Alaska Commercial Co. v. Williams*, 128 F. 362, *Myloie v. British Columbia Tug Co.*, 268 F. 449, *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. 2d 531.

It is submitted that if this Court should reverse the finding of the Court below, then there is nothing for this or the Court below to decide regarding the validity of a contract provision which purports to excuse a tug from its own negligent acts, as the law is perfectly clear.



## CONCLUSION

The judgment of the Court below should be reversed and the District Court should be directed to assess damages against Appellee, perhaps after further hearings thereon.

Dated, Honolulu, Hawaii,  
April 11, 1966.

Respectfully submitted,  
HODDICK, ROTHWELL & CHANG,  
By ROBERT M. ROTHWELL,  
*Attorneys for Appellants.*

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## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT M. ROTHWELL,  
*Attorney for Appellants.*

